No. 85-986

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

JOSEPH GISSARO,

Petitioner,

vs.

GROSS AND HECHT TRUCKING COMPANY, INC.,

Respondent.

On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether an individual union member has standing to vacate an arbitration award rendered under a collective bargaining agreement where the union's right to bring such action is time-barred, and where there is no allegation that the union breached its duty of fair representation?

2. Whether the three-month time bar of *N.J.S.A.* 2A:24-7 governing actions for vacation or confirmation of arbitration awards is replaced by the six-month limitation period prescribed by the United States Supreme Court in *Del Costello v. Teamsters*, 462 U.S. 151 (1983) in the circumstances of this case, where the action is one to vacate an arbitration award and there is no question of the union's duty of fair representation?

TABLE OF CONTENTS

	Page
Counterstatement of Questions Presented	i
Table of Contents	ii
Table of Citations	ii
Opinions Below	2
Jurisdiction	2
Procedural History and Counterstatement of Facts	2
Argument:	
Petitioner has not presented a case which warrants that this Court issue a Writ of Certiorari	4
(1) It is settled that an individual employee does not have standing to bring an action to vacate an arbitration award rendered pursuant to a collective bargaining agreement	4
(2) Petitioner's cause of action was appropriately barred by the New Jersey statute governing vacation of arbitration awards	6
Conclusion	8

TABLE OF CITATIONS

Cases Cited:

Acuff v. United Paper Makers & Workers, AFL, CIO, 404 F.2d 169 (5th Cir. 1968), cert. denied, 394 U.S. 987 (1969)	5
Adams v. Crompton and Knowles Corp., 587 F. Supp. 561 (D.C.N.J. 1983)	5
Del Costello v. Teamsters, 462 U.S. 151 (1983)	i, 7
Early v. Eastern Transfer, 699 F.2d 552 (1st Cir. 1983), cert. denied, 104 S.Ct. 93	5

TABLE OF CITATIONS—Continued

Page

F.W. Woolworth v. Miscellaneous Warehousemen's Union, Local 781, 629 F.2d 1204 (7th Cir. 1980) 6

Hadaway v. Mountainside Transport, Inc., 104 LRRM 2279 (D.C.Md.) 5

Harris v. Chemical Leaman Tank Lines, 437 F.2d 167 (5th Cir. 1971) 5

Hines v. Anchor Motor Freight, 424 U.S. 554 (1976) 5

McNair v. United States Postal Service, 768 F.2d 730 (5th Cir. 1985) 5

Miller Brewery Co. v. Brewery Workers, Local Union No. 9, 562 F. Supp. 1368 (E.D. Wisc. 1983), Modified on other grounds, 739 F.2d 1159, cert. denied, 105 S. Ct. 912 5

Saginario v. Atty. General, 87 N.J. 480 (1981) 5

Santos v. District Council of New York City, etc., 547 F.2d 197 (2d Cir. 1977) 5

Soto v. Goldman, 7 N.Y.S. 2d 397, 34 LA 173 (1960) 5

United Parcel v. Mitchell, 451 U.S. 56 (1981) 5, 7

U.S. Postal Service v. American Postal Workers Union, 564 F. Supp. 545 (S.D.N.Y. 1983) 5

Vaca v. Sipes, 386 U.S. 171 (1967) 5

Statutes Cited:

9 U.S.C.A. § 1, *et seq.* 6

9 U.S.C.A. § 12 ..... 6, 7

N.J.S.A. 2A:24-1, *et seq.* 3, 6

N.J.S.A. 2A:24-7 ..... i, 3, 6, 7

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Gross and Hecht Trucking Company, Inc., respectfully prays that this Court will decline to issue a writ of certiorari to review the judgment and opinion of the Superior Court of New Jersey, Appellate Division.

OPINIONS BELOW

The opinion of the New Jersey Superior Court, Appellate Division (Petitioner's Appendix B) is not yet officially reported. The opinion of the New Jersey Superior Court, Chancery Division (Petitioner's Appendix C) is unreported.

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JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

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PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS

Petitioner for Certiorari ("Gissaro") is a former employee of Respondent ("Gross and Hecht"). Gissaro's employment was governed by the terms of a collective bargaining agreement. The agreement contained an arbitration provision reposing exclusive control over the process with the parties to it *(i.e.*, the Company and the Union).

Gross and Hecht discharged Gissaro. An arbitrator upheld the discharge in an award mailed to the parties on July 7, 1983.

Gissaro was aware of the award in July, 1983.

Gissaro *and* the Union brought an action as co-Plaintiffs. They sought vacation of the award pursuant to *N.J.S.A.* 2A:24-1, *et seq.*, which sets a three month limitation period for bringing an action to vacate. The effective filing date of the action was December 14, 1983, more than five months after the award was delivered to the parties to the arbitration.

The trial court judge rendered a decision dismissing the cause of action brought by the Union because the complaint was not filed within three months after the award was delivered to the Union. She dismissed the complaint as to Gissaro on the ground that an individual employee is without standing to bring an action to vacate an arbitration award. The judge did not apply the time bar of *N.J.S.A.* 2A:24-7 to Gissaro's claim.

Gissaro appealed the dismissal. The Union did not. Gross and Hecht cross-appealed from that part of the trial court's decision which held that the action was not time barred.

The New Jersey Superior Court, Appellate Division, affirmed the trial court's conclusion that Gissaro was without standing to bring the action. It reversed the trial court's ruling that Gissaro's claim was not barred by *N.J.S.A.* 2A:24-7.[1]

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[1] *N.J.S.A.* 2A:24-7 states in pertinent part:

"The award must be . . . delivered to one of the parties or his attorney.

A party to the arbitration may, within 3 months after the award is delivered to him . . . commence a summary action . . . for the confirmation of the award or its vacation . . ."

The Supreme Court of New Jersey denied Petitioner's petition for certification.

ARGUMENT

PETITIONER HAS NOT PRESENTED A CASE WHICH WARRANTS THAT THIS COURT ISSUE A WRIT OF CERTIORARI.

This case does not present an issue warranting invocation of this Court's discretion to grant certiorari, in that:

The decision does not conflict with a decision of any other state court of last resort or any federal court of appeals; and

There is not an important federal question involved which needs be settled by this Court; and

The state court did not decide a federal question in a way in conflict with applicable decisions of this Court.

To the contrary, the decision rendered by the New Jersey Appellate Division is consonant with the decisions rendered by all the federal and state courts which have decided the issues.

(1) IT IS SETTLED THAT AN INDIVIDUAL EMPLOYEE DOES NOT HAVE STANDING TO BRING AN ACTION TO VACATE AN ARBITRATION AWARD RENDERED PURSUANT TO A COLLECTIVE BARGAINING AGREEMENT.

Contrary to petitioner's contention, the decision below is entirely consistent with a long line of court decisions.

The United States Supreme Court has found standing by an individual employee to sue on an arbitrator's award rendered pursuant to a collective bargaining agreement only where it is alleged that his union breached its duty of fair representation. *Vaca v. Sipes*, 386 U.S. 171 (1967); and *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976).

In *United Parcel Service v. Mitchell*, 451 U.S. 56 (1981), this Court held that, in connection with an individual employee's suit against his employer after an adverse arbitration award, "The indispensible predicate for such an action is . . . a demonstration that the union breached its duty of fair representation." 451 U.S. at 62.

Several state and federal courts have denied standing to an individual employee seeking to vacate an arbitrator's award unless the employee alleges his union's breach of its duty of fair representation. See, *Acuff v. United Paper Makers and Paper Workers, AFL, CIO*, 404 F.2d 169 (5th Cir. 1968) cert. denied, 394 U.S. 987 (1969); *Adams v. Crompton and Knowles Corp.*, 587 F. Supp. 561 (D.C.N.J. 1983); See also, *Early v. Eastern Transfer*, 699 F.2d 552 (1st Cir. 1983); *McNair v. United States Postal Service*, 768 F.2d 730 (5th Cir. 1985); *Hadaway v. Mountainside Transport, Inc.*, 104 LRRM 2279 (Md. 1980); *Harris v. Chemical Leaman Tank Lines*, 437 F.2d 167 (5th Cir. 1971); *Miller Brewing Co. v. Brewery Workers Local Union No. 9*, 562 F. Supp. 1368 (E.D. Wisc. 1983); *U.S. Postal Service v. American Postal Workers Union*, 564 F. Supp. 545 (S.D.N.Y. 1983); *Santos v. District Council of N.Y. City, etc.*, 547 F.2d 197 (2d Cir. 1977); *Saginario v. Attorney General*, 87 N.J. 480 (1981); and *Soto v. Goldman*, 7 N.Y.S. 2d 397, 34 LA 173 (1960).

Petitioner contends that *F.W. Woolworth v. Miscellaneous Warehousemen's Union Local 781,* 629 F.2d 1204 (7th Cir. 1980), establishes a more "liberal approach to the question of standing under § 301." (Petitioner's Pet. p. 11). But, *Woolworth* does not support petitioner's argument. Instead, it clearly acknowledges that an individual employee lacks standing to vacate an arbitration award.

> Individual employees may not intervene in or maintain suits under the collective bargaining agreement to set aside arbitration awards reached in pursuance of the grievance procedure so long as the union has represented the employees fairly.

F.W. Woolworth, 629 F.2d at 1210.

It is respectfully submitted that the decision below dismissing the Complaint because of Plaintiff's lack of standing to bring the action is consistent with decisions rendered in this Court and federal and state courts.

(2) PETITIONER'S CAUSE OF ACTION WAS APPROPRIATELY BARRED BY THE NEW JERSEY STATUTE GOVERNING VACATION OF ARBITRATION AWARDS.

Petitioner brought this action to vacate an arbitration award, relying upon the New Jersey Act concerning arbitration and awards, *N.J.S.A.* 2A:24-1, *et seq.* Section 7 of that Act states that an action to vacate an arbitration award must be brought within three months of the date on which the award was delivered. In this regard, *N.J.S.A.* 2A:24-7 is similar to the Federal Arbitration Act, 9 U.S.C.A. § 1, *et seq.*, which also establishes a three month limitation period. 9 U.S.C.A. § 12.

Petitioner argues that application of *N.J.S.A.* 2A:24-7 "directly conflicts with this Court's decision and reasoning in *Del Costello.*" (Petitioner's Petition p. 17)

In *Del Costello v. Teamsters,* 462 U.S. 151 (1983), this Court, recognizing that there is no federal statute of limitations in a fair representation case under § 301, adopted the six month limitation period prescribed in § 10(b) of the National Labor Relations Act. Section 10(b) sets forth the time period for the filing of unfair labor practices. This Court found § 10(b) to be particularly apt to a private action alleging a breach of the duty of fair representation, since the National Labor Relations Board has consistently held that the breach of a union's duty of fair representation is an unfair labor practice.

This case differs from *Del Costello.* It is governed by the clear mandate of *N.J.S.A.* 2A:24-7; consequently, there is no need to adopt an analogous limitation period as was the case in *Del Costello.* Further, the duty of fair representation is not involved here — indeed, the union was petitioner's co-plaintiff in the original action.

The New Jersey Superior Court, Appellate Division's application of the three month limitation period is consonant with the rationale expressed by this Court in *United Parcel v. Mitchell,* 451 U.S. 56 (1981), and with the express provision of the Federal Arbitration Act, 9 U.S.C.A. § 12.

For the foregoing reasons it is respectfully submitted that the application of the New Jersey statute of limitations for vacating arbitration awards is consistent with the decisions of this Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Court should deny Petitioner's Petition for the Writ of Certiorari.

Respectfully submitted,

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Dated: January 6, 1985